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Spirit of Service

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JUN 28 2007

Federal Communications Commission
Office of the Secretary

VIA COURIER

June 28, 2007

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: *In the Matter of Payphone Access Line Rates -- CC Docket No. 96-128*

Dear Ms. Dortch:

In recent *ex parte* submissions, Davel Communications ("Davel") has asserted that Qwest Corporation ("Qwest"), unlike the other Bell Operating Companies ("BOCs"), cannot rely on the defenses of *res judicata* and collateral estoppel in this docket, because "Qwest did not seek new services test review by -- nor file the required cost data with -- state commissions before 2002."¹ The implication is that Qwest had ignored the Federal Communications Commission's ("Commission") rules and orders concerning payphone access line (or "PAL") rates.

As explained below, this allegation is founded on a fundamental misrepresentation of the Commission's *Payphone Orders*, which did not require BOCs to file new tariffs or cost studies by 1997 unless the BOCs concluded that their payphone access line rates were inconsistent with the new services test (or "NST"). It also ignores the review of Qwest's PAL rates by numerous state commissions that occurred in Qwest's states prior to 2002, which we have summarized in Attachment A. Davel also has provided no support for its claim that Qwest did less to comply with the NST than the other BOCs, a claim that is inconsistent with the positions of other payphone providers who claim that Qwest's conduct was identical to that of other BOCs.²

¹ Letter from Brooks E. Harlow, P.C. to Ms. Marlene Dortch dated June 5, 2007. *See also*, Letter from Brooks E. Harlow, P.C. to Ms. Marlene Dortch dated May 25, 2007 ("... Qwest, unlike every other RBOC in this docket -- failed to support its existing PAL rates by filing its costs with its state commissions by April 15, 1997...")

² Letter from Albert H. Kramer to Marlene H. Dortch, May 22, 2007.

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The Payphone Orders did not require BOCs to file new tariffs or cost studies by 1997 unless they concluded that their payphone access line rates were inconsistent with the NST.

Davel once again inaccurately suggests that the Commission's *Payphone Orders* required the BOCs to file a new tariff or cost study with each state commission in 1997. This assertion is practically indistinguishable from requests made by payphone providers in 1997 that the Commission impose requirements on Regional BOCs that they either file new state tariffs or submit cost justification to the Commission.³ These requests were denied by the Commission in 1997. Qwest did exactly what was required by the Commission:

- Qwest reviewed its payphone access line rates under the NST (forward-looking costs plus reasonable overhead) and determined in the first instance that they were lawful.
- Qwest cooperated with state regulators to ensure that the NST was met to their satisfaction, and participated in state proceedings concerning payphone access line rates (including negotiating with payphone providers). *See Attachment A.*
- Qwest certified compliance with all the requirements of the *Payphone Orders*, and delivered copies of these certifications to state regulatory agencies and this Commission.

Most state commissions in Qwest's region examined Qwest's payphone access line rates prior to 2002.

Davel asserts that "Qwest failed to file cost data or seek approval of its basic payphone access line ("PAL") rates under the new services test until 2002-2003." This is false. Attachment A is a summary of Qwest's interaction with state regulators on payphone access line rates prior to 2002. Payphone providers participated in many of these proceedings, and in many cases the payphone providers agreed with Qwest to a compromise payphone access line rate. Indeed the failure of payphone providers to make proper use of state processes to raise payphone access line rates issues is the single largest cause of the current payphone providers' efforts to invoke this Commission's authority to regulate state payphone rates at this time. Contrary to the payphone providers' assertions otherwise, Qwest took compliance with the Commission's *Payphone Orders* very seriously.

³ *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 20997, 21010 ¶¶ 28-29 (1997) ("Bureau Waiver Order"); *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 21370, 21377 ¶ 16, n.45, 21380 ¶¶ 21-22 (1997).

Ms. Marlene H. Dortch
June 28, 2007

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Qwest's approach to complying with the NST in 1997 was not unique.

The Commission expressly recognized that different states would take different approaches to ensuring that BOC payphone access line rates conformed to the NST,⁴ and the type of review conducted by the states varied from state to state, depending on each state's processes and the record in each state. As was the case in Qwest's region, a number of state regulators in other states did not immediately require the filing of new payphone rates or formal cost studies in 1997. While an exhaustive study of state filings more than ten years ago is not feasible, a brief survey indicates that at least California and Florida took the same position on cost study filings that was taken by most of Qwest's states (that the Regional BOCs did not need to make any state filings if they determined that their payphone access line rates complied with the new services test).

In point of fact, when faced with the possibility that the Davel argument (that Qwest alone did not make state filings) might gain some traction at the Commission, the other payphone providers repudiated it. For example, in a recent *ex parte* presentation, the American Public Communications Council ("APCC") claimed that: "Like the other Bell Operating Companies, Qwest unjustifiably assumed that its rates complied."⁵ While the APCC is obviously incorrect in its claim that Qwest and the other BOCs simply "assumed" that their payphone access line rates were lawful, it certainly is correct that all of the BOCs interpreted the Commission's *Payphone Orders* in the same manner.

This disconnect between reality and the contentions of Davel is highlighted by an *ex parte* presentation made by the APCC on October 30, 1998.⁶ In this presentation, at Attachment B, the APCC describes its perception of state proceedings regarding payphone access line rates between 1997 and the date of the filing. It is noteworthy that at this time (far temporally closer to April 15, 1997), payphone providers were already arguing the opposite of Davel's current point, claiming that Qwest's payphone activities were the same as those of the other Regional BOCs in this filing.

Respectfully submitted,

/s/ Robert B. McKenna

⁴ See *Wisconsin Order*, 17 FCC Rcd 2051, 2066-67 ¶¶ 49-50 (2002).

⁵ Letter from Albert H. Kramer to Marlene H. Dortch, May 22, 2007.

⁶ Letter from Robert F. Aldrich to Ms. Magalie Roman Salas entitled "July 29, 1997 Inquiry Regarding New Services Test" (no docket number). This *ex parte* letter is attached hereto as Attachment B.

ATTACHMENT A

STATE PAYPHONE ACCESS LINE ACTIVITY, 1997-2002—QWEST CORPORATION (FORMERLY U S WEST COMMUNICATIONS, INC.)

Prior to 1997, Qwest Corporation ("Qwest") conducted total-service long run incremental cost ("TSLRIC") studies for "smart" payphone access line (or "PAL") services in all of its states as part of its overall efforts to comply with the Federal Communications Commission's ("Commission") payphone rules. Because "smart" PALs were necessary to support the newly unbundled Qwest payphone services, Qwest filed new "smart" payphone access line tariffs in all fourteen states in early 1997. In contrast, for "dumb" PAL services -- those generally used by independent payphone providers -- Qwest already had TSLRIC studies on file with, or available to, 12 of its state commissions that permitted them to determine whether Qwest's "dumb" PAL rates complied with the new services test.¹ Qwest reviewed these cost studies in April of 1997 and determined that they demonstrated Qwest's "dumb" PAL rates compliance with the new services test.

In 1997, Qwest delivered a certification (hereinafter, "Payphone Certification") to the state commission in each of its fourteen states, as well as this Commission, that it complied with all requirements necessary for it to qualify for payphone compensation, which included compliance with the new services test. In addition, the majority of the state commissions in Qwest's region specifically investigated and/or formally reviewed Qwest's rates for "dumb" PAL services prior to 2002.

ARIZONA. On January 15, 1997, Qwest filed revisions to its Arizona intrastate tariffs to add its new "smart" PAL service. On April 15, 1997, the Arizona Corporation Commission ("Arizona Commission") initiated a rate proceeding where it specifically conducted a new services test analysis.² The Arizona Commission also approved Qwest's PAL tariffs, subject to further examination and true-up.³ In May of 1997, Qwest delivered a Payphone Certification to the Arizona Commission. On December 31, 1998, the Arizona Commission approved a settlement agreement between the Arizona Commission staff and the Arizona Payphone Association, which reduced Qwest's dumb PAL rates, retroactive to April 15, 1997.⁴ In approving the settlement,

¹ The majority of Qwest's states had either statutory obligations or commission rules that required Qwest to price its retail services above TSLRIC or its equivalent. As a matter of practice, commissions required Qwest to have TSLRIC studies on file with the commission, or to have studies available upon request by commission staff. In 1997, the two states that did not have requirements for cost studies for payphone services were Iowa and North Dakota.

² See *In the Matter of the Application of U S WEST Communications, Inc. Filing to Revise its Network Services Tariff (Public Access Line Services)*, Docket No. T-01015A-97-0024, Decision No. 61304 ¶ 4 (Dec. 3, 1998) ("Arizona Order").

³ *Id.* at Settlement Agreement ¶ 5.

⁴ See *Arizona Order* ¶ 5.

ATTACHMENT A

the Arizona Commission stated that “[t]he rates and charges contained in the Agreement are just and reasonable and in compliance with all applicable state and federal law.”⁵

COLORADO. On January 15, 1997, Qwest filed revisions to its Colorado intrastate tariffs to add its new “smart” PAL service. In May of 1997, Qwest delivered a Payphone Certification to the Colorado Public Utility Commission (“Colorado Commission”). On March 31, 1998, the Colorado Payphone Association filed a complaint alleging that Qwest’s “dumb” PAL rates were not in compliance with the new services test. On May 4, 1998, the Colorado Commission adopted an order reducing, on a prospective basis, Qwest’s “dumb” PAL rates in order to comply with the new services test.⁶ Contrary to the payphone providers’ assertions,⁷ the rates ordered by the Colorado Commission were final, though the Colorado Commission noted that Qwest would be required to comply with this Commission’s “future specific directives regarding the pricing of payphone services.”⁸

IDAHO. On January 15, 1997, Qwest filed revisions to its Idaho intrastate tariffs to add its new “smart” PAL service. Preexisting “dumb” PAL rates were unchanged. In May of 1997, Qwest delivered a Payphone Certification to the Idaho Public Utilities Commission (“Idaho Commission”). No complaints were filed with the Idaho Commission regarding Qwest’s pre-existing “dumb” rates.

IOWA. On January 15, 1997, Qwest filed revisions to its Iowa intrastate tariffs to add its new “smart” PAL service. In May of 1997, Qwest delivered a Payphone Certification to the Iowa Utilities Board (“Iowa Board”). On March 22, 1999, Payphone Concepts, Inc. filed a complaint alleging that the “dumb” PAL rates of Qwest and other Iowa incumbent local exchange carriers exceeded the new services test. On July 30, 1999, the Iowa Board dismissed the complaint, finding that Qwest had made at least a *prima facie* case of new services test compliance, and there was no reasonable basis for further investigation of Qwest’s payphone pricing.⁹

MINNESOTA. In April 1996, the Minnesota Public Utilities Commission (“Minnesota Commission”) started an investigation of Qwest’s payphone rates.¹⁰ On January 15, 1997, Qwest

⁵ *Id.* at Conclusions of Law ¶ 6.

⁶ See *Colorado Payphone Association v. U S WEST Communications, Inc.*, Public Utilities Commission of the State of Colorado, Docket No. 98F-146T, Decision No. C99-497 (May 18, 1999) (“*Colorado Commission Order*”).

⁷ See Letter from Brooks E. Harlow, Miller Nash LLP, counsel for Davel Communications, Inc., *et al.*, to Marlene H. Dortch, Federal Communications Commission, CC Docket No. 96-128, dated Feb. 22, 2007 at n.7.

⁸ See *Colorado Commission Order* at 7.

⁹ See *In re Payphone Services*, Order Terminating Investigation, Docket No. INU-99-1 (July 30, 1999).

¹⁰ Order Initiating Expedited Proceeding and Establishing Timetable for Comments and Replies, Docket No. P-421/C-95-1036.

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filed revisions to its Minnesota intrastate tariffs to add its new "smart" PAL service. In May of 1997, Qwest delivered a Payphone Certification to the Minnesota Commission. In 1997 and 1998, the Minnesota Independent Payphone Association filed complaints regarding Qwest's payphone access services, focusing on allowing payphone providers to resell Qwest's local business lines. Ultimately the Association prevailed and the resale request was granted.¹¹ In each of these investigations, the payphone providers could have questioned Qwest's compliance with the new services test, but did not.

MONTANA. On January 15, 1997, Qwest filed revisions to its Montana intrastate tariffs to add its new "smart" PAL service. In May of 1997, Qwest delivered a Payphone Certification to the Montana Public Service Commission ("Montana Commission"). The Montana Commission subsequently consolidated its review of Qwest's PAL rates in an existing general rate docket, and the Northwest Payphone Association intervened. On August 26, 1998, the Montana Commission found that Qwest's rates met the new services test.¹² Following an appeal of this decision by the Northwest Payphone Association, the Montana Commission approved a settlement that resulted in a reduction of Qwest's "dumb" PAL rates.¹³

NEBRASKA. On January 15, 1997, Qwest filed revisions to its Nebraska intrastate tariffs to add its new "smart" PAL service. In May of 1997, Qwest delivered a Payphone Certification to the Nebraska Public Service Commission ("Nebraska Commission"). A 1997 investigation by the Nebraska Commission focused on whether payphone investment had been removed from access rates.¹⁴ On June 8, 1999, the Nebraska Commission commenced an investigation of whether Qwest's PAL rates complied with the new services test.¹⁵ This docket was closed without a decision on the rates in 2002, and refunds requested by payphone providers were accordingly denied.¹⁶

¹¹ See *In the Matter of a Formal Complaint of the Members of MIPA Against U S WEST Communications, Inc.*, Docket No. P-421/C-95-1036, 1996 Minn. PUC LEXIS 160 (Nov. 27, 1996, *recon denied*, 1997 Minn. PUC LEXIS 6 (Mar. 3, 1997)).

¹² *In the Matter of the Application of U S WEST Communications, Inc. to Restructure its Prices for Regulated Telecommunications Service*, Utility Division Docket No. D96.12.220, Order No. 5965c, Final Order (Aug. 26, 1998).

¹³ See *In the Matter of the Application of U S WEST Communications, Inc., to Restructure its Prices for Regulated Telecommunications Service*, Final Order on Settlement of Judicial Review, Docket No. D96.12.220, Order No. 5965e (Mar. 8, 1999).

¹⁴ See *In the Matter of the emergency petition of MCI Telecommunications Corp. and AT&T Communications both of Denver, Colorado, to investigate compliance of Nebraska LECs with FCC Payphone Orders*, Order Accepting Stipulation, Issuing Findings and Closing Docket at 1, (Aug 3, 1999)

¹⁵ *Id.* at 2.

¹⁶ See *In the Matter of the Application of the Commission, on its own motion, to conduct an investigation into specific areas of concern in the provisioning of payphones in the state of Nebraska*, Order Closing Docket and Merging Record into Application No. C-2696/PI-57 (Mar. 19, 2002).

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NEW MEXICO. On January 15, 1997, Qwest filed revisions to its New Mexico intrastate tariffs to add its new "smart" PAL service. On February 21, 1997, the New Mexico Public Utility Commission ("New Mexico Commission") initiated a docket to investigate compliance with this Commission's *Payphone Orders*. The state commission noted that it (and other states) had responsibility for determining whether intrastate tariffs had been filed in accordance with the new services test.¹⁷ In May of 1997, Qwest delivered a Payphone Certification to the New Mexico Commission. On August 21, 1997, the New Mexico Commission found that Qwest's payphone tariff was "just and reasonable and in compliance with all legal requirements."¹⁸ The New Mexico Commission noted Qwest's statement that it had reviewed its "payphone related" services, including "dumb" PAL services, for compliance with the new services test, and found that each complied with that test.¹⁹

NORTH DAKOTA. On January 15, 1997, Qwest filed revisions to its North Dakota intrastate tariffs to add its new "smart" PAL service. "Dumb" PAL rates were not changed. In May of 1997, Qwest delivered a Payphone Certification to the North Dakota Public Service Commission ("North Dakota Commission"). No complaints were made to the North Dakota Commission challenging Qwest's "dumb" PAL rates.

OREGON. On January 15, 1997, Qwest filed revisions to its Oregon intrastate tariffs to add its new "smart" PAL service. In May of 1997, Qwest delivered a Payphone Certification to the Oregon Public Utility Commission ("Oregon Commission"). In 1997, the Oregon Commission conducted a review of Qwest's earnings and rates. Qwest's "dumb" payphone rates were specifically selected for review in this proceeding. The Northwest Payphone Association challenged Qwest's "dumb" PAL rates in this proceeding, claiming that the rates did not comply with the new services test. The Oregon Commission disagreed and sustained Qwest's rates for "dumb" PAL services.²⁰ The Northwest Payphone Association appealed the Oregon Commission decision. On November 10, 2004, in light of this Commission's *Wisconsin Order*, the Oregon Court of Appeals remanded the PAL rate decision to the Oregon Commission.²¹ The Oregon Commission currently has an open docket to implement the court's remand.

SOUTH DAKOTA. On January 15, 1997, Qwest filed revisions to its South Dakota intrastate tariff to include its new "smart" PAL service, and a payphone provider intervened in the

¹⁷ See *In the Matter of Compliance with Federal Regulation of Payphones*, Findings of Fact, Conclusions of Law and Order, Docket No. 97-69-TC ¶ 27 (Aug. 21, 1997) ("*New Mexico Order*").

¹⁸ *Id.* ¶ 54.

¹⁹ *Id.* ¶ 53.

²⁰ See *In the Matter of the Application of U S WEST Communications, Inc., for an Increase in Revenues*, Order, Docket No. UT 125/UT 80, Order No. 00-190 at 6-7 (Apr. 14, 2000) and Order No. 01-810 at 48-56 (Sept. 14, 2001).

²¹ *Northwest Public Communications Council v. Public Utility Commission of Oregon*, 100 P.3d 776 (Nov. 10, 2004)

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resulting docket. In May of 1997, Qwest delivered a Payphone Certification to the South Dakota Public Utilities Commission ("South Dakota Commission"). On October 17, 1997, the South Dakota Commission found Qwest's "smart" PAL rates to be reasonable, and the contribution margin (which is the same for "smart" and "dumb" PAL rates) likewise reasonable.²²

UTAH. On January 15, 1997, Qwest filed revisions to its Utah intrastate tariffs to add its new "smart" PAL service. "Dumb" PAL rates were not changed. On April 14, 1997, MCI and AT&T filed an emergency petition with the Utah Public Service Commission ("Utah Commission") requesting, among other things, that payphone rates be cost justified. The claims were referred to the pending Utah general rate case, and parties complaining about PAL rates were directed to file complaints. In May of 1997, Qwest delivered a Payphone Certification to the Utah Commission. No complaints were filed contending that Qwest's "dumb" PAL rates were excessive.

WASHINGTON. On January 15, 1997, Qwest filed revisions to its Washington intrastate tariffs to add its new "smart" PAL service. "Dumb" PAL rates were not changed. On April 16, 1997, AT&T and MCI filed a formal complaint contending that Qwest had not removed all payphone investment from its intrastate access rates. This complaint was ultimately successful and Qwest was required to reduce its access charges. In May of 1997, Qwest delivered a Payphone Certification to the Washington Commission. No complaints were filed contending that Qwest's "dumb" PAL rates were excessive.

WYOMING. On January 15, 1997, Qwest filed revisions to its Wyoming intrastate tariffs to add its new "smart" PAL service. In May of 1997, Qwest delivered a Payphone Certification to the Wyoming Public Service Commission ("Wyoming Commission"). On September 16, 1999 the Wyoming Commission approved a comprehensive price plan for Qwest. Every rate was to be based on TSLRIC costs, plus a 26% margin. The Wyoming Commission expressly approved payphone access line rates, finding that "the prices for Public Access Line pricing . . . constitute well reasoned and proper applications of the Act and the evidence to reach an acceptable pricing result."²³

²² *In the Matter of the Filing by U S WEST Communications, Inc. for Revisions to its Exchange and Network Services Tariff*, Order Approving Revisions to the Tariff, TC97-006, at 2-3 (Oct. 17, 1997). The contribution margin is the difference between the TSLRIC of the service and the proposed price, or the amount of revenue that the service contributes to the common overhead cost recovery of the firm.

²³ *In the Matter of the Application of U S WEST Communications, Inc., for authority to implement prices in conjunction with its proposed Wyoming price regulation plan for essential and noncompetitive services*, Docket No. 70000-TC-99-480 (Record No. 4868) ¶¶ 140-41 (Sept. 16, 1999).

ATTACHMENT B

STAMP AND RETURN

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October 30, 1998

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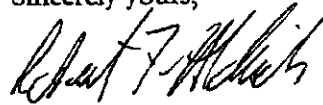
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARYMs. Magalie Roman Salas
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554NOTICE OF WRITTEN
EX PARTE PRESENTATIONRe: July 29, 1998 Inquiry Regarding New Services Test

Dear Ms. Salas:

Enclosed please find a copy of a letter to Mr. Lawrence Strickling, Chief of the Common Carrier Bureau, with regards to the above-referenced July 29, 1998 Inquiry re New Services Test to be filed with the Commission and placed in the record of the proceeding. If you have any questions regarding this letter, please call the undersigned.

Sincerely yours,



Robert F. Aldrich

RFA/nw
Enclosure

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October 30, 1998

By Hand

Mr. Lawrence Strickling
Chief - Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 500
Washington, DC 20554

Re: July 29, 1998 Inquiry Regarding New Services Test

Dear Mr. Strickling:

We are writing on behalf of the American Public Communications Council ("APCC") regarding the request of the Attorney General of New Jersey for an explanation of the application of the "new services test" pursuant to the FCC's Payphone Orders.¹ The specific question posed by the Attorney General is whether "message units," i.e., usage-sensitive rates charged by Bell Atlantic for local service to payphone service providers ("PSPs"), must satisfy the new services test. For the reasons stated in this letter, the Bureau should answer the question in the affirmative.

Reading the FCC's Payphone Order in light of logic, plain meaning, and the purposes of the Act, it is clear that local exchange carriers' ("LECs") usage-sensitive as well as monthly rates for local service to PSPs must comply with the new services test. Bell Atlantic's attempt to exempt its local usage rates from application of the test is merely the latest of the Bell Companies' continuing efforts to evade effective regulatory review of the rates charged to PSPs. See note 3, below.

¹ Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128 ("Payphone Implementation"), Report and Order, 11 FCC Rcd 20,541 (1996) ("Payphone Order"); Order on Reconsideration, 11 FCC Rcd 21,233 (1996) ("Payphone Reconsideration Order") (together the "Payphone Orders"), vacated in part, *aff'd in relevant part*, *Illinois Public Telecom. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir.), *clarified*, 123 F.3d 693 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 1361 (1998).

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Background

In the state commission proceeding giving rise to the inquiry, the New Jersey Board of Public Utilities ("Board") is considering whether, in order to implement the Payphone Orders, Bell Atlantic should be required to reduce its rates for local exchange service to PSPs.² The Payphone Orders require that LECs' state-tariffed as well as federally tariffed services to PSPs must comply with Computer III tariffing requirements, including the "new services test."

The Bureau staff has met with representatives of the New Jersey Payphone Association and Bell Atlantic, and has been provided with copies of the briefs of each party filed on this issue before the Board. However, the significance of this issue extends well beyond the specific New Jersey proceeding that prompted the inquiry to the Bureau. "New services test" proceedings regarding payphone service rates are pending in numerous states. See Attachment 1. APCC is submitting this letter to address the issue from a national perspective and to respond to a recent submission by the RBOC/GTE/SNET Payphone Coalition. Letter from Michael Kellogg to Kathryn Brown, dated October 16, 1998. ("RBOC/GTE/SNET Coalition Letter").

The Payphone Orders intended a comprehensive reform of LECs' relationship with their own payphone divisions and with independent PSPs. To carry out the provisions of Section 276 of the Act, LECs were required to remove all interstate and intrastate subsidies of their retail payphone services by regulated revenues, and were required to eliminate all discrimination in favor of their own payphone operations and against independent PSPs. 47 U.S.C. §§ 276(a), (b)(1).

As part of this comprehensive reform, the FCC required LECs to tariff, at the state level, "nondiscriminatory basic payphone services that enable independent providers to offer payphone services" Payphone Reconsideration Order, 11 FCC Rcd at 21,308, ¶ 162. The Commission spelled out the state tariffing requirements as follows:

We require LECs to file tariffs for the basic payphone services and unbundled functionalities in the intrastate and interstate jurisdictions as discussed below. LECs must file intrastate tariffs for these payphone services and any unbundled features they provide to their own payphone services. The tariffs for these LEC payphone services must be: (1) cost based; (2) consistent with the requirements of Section 276 with regard, for example, to the removal of subsidies from exchange and exchange access services; and (3)

² The Payphone Orders describe local exchange services provided to PSPs as "payphone services." Payphone Reconsideration Order, ¶ 163. However, the term "payphone services" has a different meaning in other contexts. It is also used to describe services offered by payphone service providers.

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nondiscriminatory. States must apply these requirements and the Computer III guidelines for tariffing such intrastate services.

Id., ¶ 163 (emphasis added). In a footnote, the Commission explained that the "Computer III tariffing guidelines" to be applied included the "new services test." Id., n. 492. The FCC's purpose in imposing this requirement was to prevent a LEC from charging excessive rates to its own payphone competitors. Payphone Order, 11 FCC Rcd at 20,614.

Subsequently, the Bureau clarified that the "new services test" requirement applied to all state-tariffed "payphone services," including previously existing as well as newly tariffed services, and that it applied to "dumb line" services provided for use with the "smart" payphones used predominantly by independent PSPs, as well as "smart line" services provided for use with the "dumb" payphones used predominantly by LEC payphone divisions.³

The plain meaning of Payphone Reconsideration Order is that the new services test applies to *both* monthly *and* usage-sensitive rates for local exchange service offered to PSPs.⁴ Such an interpretation is consistent with subsequent Bureau orders and with the following summary of the application of the new services test, in a letter dated September 12, 1997, from the Chief of the FCC's Common Carrier Bureau to the Chair of the North Carolina Utilities Commission:

³ Payphone Implementation, Order, DA 97-678 (Com. Car. Bur.), released April 4, 1997 ("April 4 Order"), ¶¶ 27, 31-32. Initially, the Bell companies had taken the position that the requirement to conform their payphone service tariffs with the new services test applied only to the "smart line" services that are used almost exclusively by the LECs' own payphones. Accordingly, virtually none of the Bell companies met the Commission's April 15, 1997 deadline to revise their rates -- either monthly recurring or usage-sensitive -- for "dumb line" services connected to independent PSPs' "smart" payphones. Most of the RBOCs also did not initially file federally tariffed rates for unbundled features and functions such as outward call screening used by PSPs in conjunction with "dumb line" service. The Common Carrier Bureau then issued its April 4 Order to make clear the LECs' obligations. Subsequently, the Bell companies sought and were granted a temporary waiver of the deadline for bringing their state-tariffed payphone services into compliance with the new services test. Payphone Implementation, Order, DA 97-805 (Com. Car. Bur.), released April 15, 1997, ¶ 14.

⁴ Contrary to the RBOC/GTE/SNET Coalition's claim, the Bureau has not "answered this question informally in the negative." Although a Maryland PSC staff member drew certain conclusions about the application of the new services test based on a telephone conversation with a member of the FCC's staff, an expert witness for the PSP party in that proceeding, Dr. Marvin H. Kahn, spoke with the same FCC staff member and reached the opposite conclusion. See Attachment 2.

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The FCC required that *all* incumbent LEC payphone tariffs filed at the state level be cost-based, nondiscriminatory, and consistent with both Section 276 and the Commission's Computer III tariffing guidelines. *The rates assessed by LECs for payphone services tariffed at the state level must satisfy the requirements that the Commission applies to new interstate access services proposed by incumbent LECs subject to price cap regulation (the "new services test") as demonstrated by the supporting cost documentation submitted to the individual state commissions.*

(emphasis added).

Indeed, application of the new services test to usage-sensitive as well as monthly rates for payphone line services is essential to achieving the objectives of the FCC and Congress in reforming payphone regulation. Application of the new services test to rates for LEC services to PSPs was mandated in order to prevent a LEC from charging excessive rates to its payphone competitors. Payphone Order, 11 FCC Rcd at 20,614. Local usage charges, which are typically priced several hundred percent above direct costs, often make up well over 50% of a PSP's bill for local telephone service, and are an important cost factor influencing PSPs' decisions about placement and retention of payphones in particular locations. If *only* monthly rates for payphone lines were subject to the new services test, while local usage rates for those lines were excluded from the test, the RBOCs would be able to continue charging excessive rates for a major component of their competitors' phone bills. Insulating local usage rates from the application of the federal pricing standard would thereby thwart the Commission's purpose to ensure cost-based rates for payphone services, and would frustrate the achievement of the federal objectives to promote competition and the widespread deployment of payphones.⁵

The RBOC/GTE/SNET Coalition argues that usage-sensitive rates should not be subject to the new services test because local usage is not an essential component of the "basic payphone line" referenced in the Payphone Orders. RBOC/GTE/SNET Letter at 3-4. As a practical matter, however, unless a charge for local usage is included in the monthly line rate, PSPs virtually always incur local usage charges when they subscribe to payphone lines. "Bare" payphone lines without local calling are useless to PSPs, except in

⁵ 47 U.S.C. § 276(b). Thus, there is no validity to the RBOC/GTE/SNET coalition's argument that cost-justifying the monthly line rate alone, without usage, under the new services test would suffice to comply with the "cost-based rates" requirement of the Payphone Orders. RBOC/GTE/SNET Letter at 5. Furthermore, accepting the RBOC/GTE/SNET Coalition's suggestion that the LEC can qualify its monthly line rate under the new services test "with or without some measure of usage included," would leave the door open to pricing abuse. RBOC/GTE/SNET Letter at 4. In some states, for example, LECs have chosen to include a "measure of usage" in their rates for the "smart" lines used predominantly by their own "dumb" payphones, while charging separate rates for usage of the "dumb" lines used predominantly by competitors' "smart" payphones.

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the most specialized types of locations.⁶ The Commission's purpose was not limited to ensuring cost-based rates for providers of coinless airport phones; the Commission intended to ensure cost-based rates for *all* PSPs. For the vast majority of payphones, applying the new services test *only* to the monthly charge for a payphone line would accomplish little, because the LEC could continue loading excessive costs onto the usage charge that is not subject to the test.

The language of the Payphone Order indicates no intent to so narrowly limit the application of the new services test. While the RBOC/GTE/SNET Coalition tries to attach significance to the use of the term "basic payphone line" in parts of the relevant orders, the critical passage of the Payphone Reconsideration Order uses primarily the term "basic payphone services" to describe the services subject to the "new services test."⁷ Both terms -- basic "basic payphone services" and "payphone line" -- are reasonably read to encompass usage-sensitive as well as monthly rates for such services or lines, and the use of the term "service" belies any attempt to narrowly construe "line" to mean only the "bare" line without usage.

The RBOC/GTE/SNET Coalition also argues that it is inappropriate to apply the new services test to message unit rates when those rates "are identical to the message units charged to business subscribers under previously existing tariffs." RBOC/GTE/SNET Coalition Letter at 3. The RBOC/GTE/SNET Coalition claims that applying the new services test to such rates would intrude on state regulation because state public service commissions would be constrained to apply the revised rates to business subscribers as well as PSPs. *Id.* at 5-6. It is important to note that this argument is fact-specific and would be applicable, if at all, only where identical charges for usage are assessed on PSPs and business subscribers. That was *not* the case in New Jersey at the onset of the proceeding before the Board. Even though the same message unit rate is referenced in both tariffs, PSPs were not offered the message unit allowance (75 free calls per line per month) that is made available to business subscribers. Until earlier this month, when the Board required Bell Atlantic, for the first time in 14 years, to offer a message unit allowance to PSPs, the effective rates paid by the two types of subscribers were *not* the same.

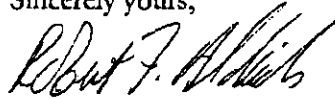
⁶ The RBOC/GTE/SNET Coalition suggests that a payphone line may be used without local usage "if a PSP chose to install a coinless payphone." Yet, in the FCC's payphone compensation proceeding, the Coalition has explained that coinless payphones cannot realistically be installed in the vast majority of payphone locations. RBOC/GTE/SNET Payphone Coalition, Petition for Reconsideration, CC Docket No. 96-128, filed December 1, 1997, at 9-10.

⁷ The term "basic payphone line" is used in the same paragraph to describe services that need not be tariffed at the federal level.

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In any event, there is no basis for the RBOC/GTE/SNET Coalition's claim that the application of the new services test to usage-sensitive payphone service rates would force a revision of rates charged to other classes of subscribers.⁶ Only service to PSPs, not service to other subscribers, is subject to the requirements of the Payphone Orders. Thus, the application of the new services test cannot produce any unreasonable discrimination between PSPs and other subscribers. On the other hand, tying the application of the new services test to whether the rates paid by PSPs also apply to any other subscriber would make it wholly arbitrary whether or not a LEC's payphone service rates are subject to effective review under the Payphone Orders.

Sincerely yours,



Albert H. Kramer
Robert F. Aldrich

RFA/nw

cc: James Schlichting
Jane Jackson
Dorothy Atwood
Judy Nitsche
Dan Abeyta
Glenn Reynolds
Kris Monteith

⁶ If accepted, this logic would not be limited to local usage rates. Monthly recurring charges for a payphone line are sometimes the same as for a business line. Indeed, Bell Atlantic recently equalized its monthly rates for business subscribers and PSPs. Under the logic of the RBOCs' argument, the new services test could not be applied to *any* rate that is also applicable to any non-PSP subscriber.

ATTACHMENT 1

American Public Communications Council
State Tariff Updates
(As of 8/21/98)

AMERITECH REGION

Illinois

There is a proceeding going on - all LECs are under investigation.

Indiana

A proceeding to review LEC payphone tariffs is underway. Phase I of the proceeding involves GTE North, Ameritech, and Sprint United. Phase II of the proceeding (not yet started) involve all other LECs. Indiana Payphone Association comments in Phase I are due August 28, 1998. ILEC comments (reply) due 10/30/98.

Michigan

The MPTA and 62 of its members filed a complaint at the Michigan Public Service Commission on 8/10/98 against Ameritech and GTE, case # U-11756. The complaint was brought to compel enforcement of Section 318 of the Michigan Telecommunications Act which required these LECs to comply with the nonstructural safeguards ordered by the FCC. Among these safeguards is the new services test, requiring LECs to price their network services at the direct cost of the service, plus reasonable overhead expenses. In addition, it appears neither Ameritech nor GTE currently pass an imputation test as required by the Michigan Telecommunications Act. The complaint also seeks the elimination of any subsidies flowing from noncompetitive ratepayers' basic exchange service revenue to LEC's competitive payphone services.

Ohio

The state commission opened an investigation docket (96-1310-TP-C01) for all LECs regarding their payphone tariffs. In January, the Commission issued an order allowing the Payphone Assn. of Ohio to review LEC information regarding these tariffs. Additional comments were filed on 3/30/98. Review of LEC payphone tariffs is continuing.

Wisconsin

The state commission on July 29, 1997 issued a notice of investigation and request for briefs regarding the Wisconsin Pay Telephone Association's petition regarding LEC payphone tariffs and other issues being investigated by the commission.

The commission staff concluded that the commission is without authority to review filed tariffs and determine whether they meet the FCC's new services test. The staff states in their brief, "Wisconsin law exclusively controls the regulatory options that are available to this Commission. The application of directory language in the recent FCC orders in the pay telephone proceeding cannot create regulatory authority for this Commission that does not already exist by virtue of state law."

Subsequently, the Wisconsin PSC stated that it is without statutory jurisdiction to apply the new services test. The WPTA petitioned the FCC for relief in February 1998 and is pursuing its petition.

BELL ATLANTIC REGION

Delaware

The Delaware PSC (DPSC) issued Order No. 4637 on November 4, 1997 in Docket No. 97-013T in which Bell Atlantic's state tariffs for payphone lines and related services were investigated. Essentially, the monthly rates for COCOT lines were lowered to \$16.63. A significant decrease. In addition, the DPSC ordered that Bell Atlantic file state tariffs for payphone feature and functions at reduced monthly rates. Finally, the DPSC ordered Bell Atlantic to promptly refund to its customers the difference between the rates and charges ordered on November 4, 1997 and those charges in effect on April 15, 1997.

D.C.

The DC PSC approved BA-DC's revised payphone tariffs on April 15, 1997. On May 15, 1997, Peoples Telephone filed an application for partial reconsideration. Since June 11, 1997, the DC PSC has repeatedly postponed a decision in this proceeding "due to the complexity of the issues raised."

On May 19, 1997, BA-DC applied to amend its tariff to reduce monthly charges for Line Side Answer Supervision (LSAS) to \$1.50 and Call Screening features to \$1.50, and eliminate monthly charges for Audiotex Call Blocking Service. Peoples filed comments on BA-DC's application on October 14, 1997. Pursuant to the DC PSC's request, on November 25, 1997, BA-DC reduced LSAS to \$0.15 and call screening to \$0.0.

Maryland

Peoples Telephone Co. petitioned the PSC to investigate Bell Atlantic's tariffs for payphone services. The state commission is investigating Bell Atlantic's payphone tariffs. Direct

testimony in Case No. 8763 was filed on September 22, 1997. Hearings were held October 21-22, 1997. Briefing was completed in February. The MD Commission still has to issue an order.

Massachusetts

The Dept. of Telecommunications and Energy is conducting a 3-pronged proceeding (DTE 97-18 (Phase II)) to (a) identify and eliminate barriers to entry, (b) consider whether Bell's tariffs for Public Access Line and Public Access Smart Line service meet FCC requirements (i.e., the new services test), and (c) address the issue of public interest payphones. Comments have been obtained on the tariff issues.

New Hampshire

A docket on the new services test opened in Spring 1998. On track for completion by the end of 1998 or early 1999.

New Jersey

The Bell Atlantic payphone tariff case is pending before an Administrative Law Judge. Discovery is almost complete and hearings are scheduled for Fall 1998. In addition, the NJPA has filed a motion seeking to clarify that the message unit rate is subject to the new services test.

New York

The state commission is still investigating the LECs' tariffs. NY Telephone's tariffs are in effect on a temporary basis.

Pennsylvania

The Central Atlantic Payphone Association (CAPA) has three cases before the PA PSC, all of which affect rates charged by LECs for service to PSPs. In the first proceeding, a rate complaint was filed against Bell alleging that its payphone network service rates are not cost based and are not compliant with the new services test. In the litigation, Bell took the position that usage rates did not have to be cost based and were not subject to the new services test. Earlier in 1998, the ALJ held that the "new services test" is applicable to LEC rates for local usage provided to IPPs.

The second proceeding is a similar complaint brought against GTE. While GTE has reduced its feature rates, its dial tone rates remain high.

The third proceeding is a petition filed by Bell seeking to have all of its business services, including payphone network services, declared "competitive" under PA law. The result, if granted, would be that Bell's rates for those services would be deregulated at the state level, completely undermining the significant progress CAPA has made in getting Bell's rates reduced.

If granted, jurisdiction over payphone rates may default to the FCC. CAPA is actively participating in this proceeding.

Virginia

On March 21, 1997, a group of several payphone providers (PSPs) filed with the State Corporate Commission of Virginia, a Motion to Reject and Petition for Investigation of tariffs filed by BA-VA, GTE South, United Telephone-Southeast, Central Telephone Company of Virginia and several other Virginia LECs purporting to comply with Section 276 of the 1996 Act and the FCC's orders in 96-128. On March 28, 1997, the Commission issued an Order Authorizing Interim Rates and Initiating Investigation. In the Order, the Commission found that the proposed tariffs should be investigated, and that the proposed rates should be allowed to go into effect as interim rates, subject to refund. The Commission also took pains to note that "allowing these tariffs to take effect in no way indicates or implies compliance with Section 276 of the Act of with the FCC's orders in 96-128."

To date, the VA LEC Payphone Service tariff proceeding has been dormant, essentially for two reasons. First, the VA Commission unsuccessfully challenged the FCC's deregulation of local coin call rates.

Secondly, the Commission has been considering a host of cost modeling and pricing issues to determine the permanent prices that BA-VA will be authorized to charge CLECs for interconnection, resale, and unbundled network elements under the local telephone provisions of the 1996 Act.

On May 22, 1998, the Commission issued an Order on CLEC interconnection that, among other things, directed BA-VA to rerun its cost studies and prices to conform with the principles in the Commission's decision. On July 8, 1998, BA-VA made a compliance filing with new prices, and the parties filed comments on July 31, 1998. Ultimately, the Commission will issue a Final Order prescribing the permanent prices that BA-VA will be permitted to charge CLECs for interconnection, resale and unbundled network elements. Those prices, and the underlying principles established in the May 22, 1998 Order concerning cost modeling, pricing and input values and assumptions, may be relevant to the VA LEC Payphone Service tariff cost-based rate proceeding.

West Virginia

The PSC has completed review of Bell Atlantic's payphone tariffs. The decision was particularly favorable in two respects. First, the PSC found that Bell did not justify its proposed overhead allocation factors ranging from 23% to 92%, and found that an overhead allocation factor exceeding 10.2%—the loading factor approved in the PSC's unbundled network element (UNE) proceeding—was not reasonable. Second, the PSC found that Bell's payphone rates should be reduced by the EUCL/SLC (federal subscriber line charge) because otherwise, Bell would obtain a double-recovery of interstate costs associated with payphone lines.

BELLSOUTH REGION

Alabama

In late 1997, the Alabama Commission found that BellSouth's payphone tariff rates were acceptable and approved them.

Florida

The Florida Commission voted on 7/21/98 to approve the existing tariffs for COCOT and Coin Lines as meeting the new services test.

Georgia

The Georgia Public Service Commission has still not scheduled hearings on the objections GPCA filed [March 12, 1997] challenging 34 LECs' payphone service tariff filings, including that of BellSouth.

Kentucky

The Kentucky Commission on 2/12/98 and 2/13/98 held hearings on the payphone tariffs of BellSouth, GTE and Cincinnati Bell. The Kentucky Payphone Assn. (KPA) filed its brief in April. An order in this proceeding is expected from the PSC by end of summer.

Louisiana

Docket U-22632 was opened by the Louisiana Commission in order to investigate BellSouth's payphone tariffs. BellSouth originally attempted to deny retroactive refunds. The ALJ asked that this issue be briefed. BellSouth insisted that it did not need to file new tariffs, as its existing tariff allegedly complied with the new services test. Intervenors [Gulf States Public Communications Council (GSPCC) and the Louisiana Public Payphone Assn. (LPPA)] made the argument that BellSouth did not use the new services test, and used regional cost data, not state specific cost data. They are awaiting the ALJ opinion on the retroactivity issue and a scheduling order.

North Carolina

On May 15, 1997, the Commission issued an order that dismissed petitions by the NCPA and others and directed filings in Dockets No. P-100, Sub 84b and P-55, Sub 1040. The Commission ordered that "all LECs who determine, based on their own analysis, that any existing PTAS rates do not meet the "new services" test, file revised rates and supporting data with the FCC for review by May 19, 1997. Existing rates include rates for PTAS lines and trunks, PTAS usage

rates, and rates for various PTAS options. LECs who decide to file cost studies for existing rates that they conclude do not meet the "new services" test shall file those studies with the FCC."

On September 12, 1997, the FCC Common Carrier Bureau informed the chair of the NC Commission that it would direct all incumbent LECs in the state to file tariffs for payphone services with the FCC together with the supporting documentation necessary to demonstrate compliance with the requirements of Section 276 and the FCC implementing rules. The FCC Common Carrier Bureau issued the Order on 3/20/98, directing all incumbent LECs in NC to file tariffs with the FCC by 5/1/98. Subsequently, the Bureau extended the filing deadline to 7/1/98.

The NC PSC then informed the FCC it has reconsidered and would hold a proceeding on the new services test. The Bureau rescinded its order requiring tariff filing at the FCC

South Carolina

In proceedings initiated by the South Carolina Public Communications Assn. (SCPCA), hearings will be conducted by the South Carolina Commission in late September and early October 1998 to determine whether the major LECs (BellSouth, GTE, Alltel and Sprint United) have complied with the new services test.

With regard to the 22 smaller LECs, the commission has already ruled that these tariffs are in compliance. The SCPCA has appealed this decision to the circuit court.

Tennessee

A proceeding is pending regarding whether BellSouth's payphone tariff complies with the new services test. The TN Regulatory Authority has postponed the LEC tariff investigation until August/September 1998 since it has not concluded the CLEC interconnection and USF dockets. When these dockets are concluded, the results may be relevant to the payphone tariff investigation.

PACIFIC BELL REGION

Nevada

Sprint Centel filed to eliminate the \$.06/message rate from their payphone tariffs. Centel proposed to offset this loss by charging for directory assistance. A hearing was held in September 1997. Since Centel settled on the message rate, the Commission hearing has been cancelled. As of October 16, 1997, the message rate was eliminated

SOUTHWESTERN BELL REGION

Oklahoma

The Oklahoma Payphone Assn. (OPA), intervened in all LEC payphone tariff cases. A procedural hearing for 10 rural LECs is scheduled. The Commission declined to require cost-based economic studies for small LECs. SBC states that its rates are subject to true up at a later date.

Texas

There were approximately 50 LEC FCC Compliance dockets in Texas. The Texas Payphone Association (TPA) intervened in all of them. TPA was successful in negotiating with Southwestern Bell Telephone Company an agreement under which Texas PSPs are assessed a reasonable flat rate for the payphone access line and usage. Likewise TPA was successful in negotiating with GTE so as to achieve a reduction in the line rate initially proposed by GTE.

The remaining cases involve smaller LECs, whose current charges vary from under \$10.00 to in excess of \$70.00. The Office of Policy Development of the Public Utilities Commission of Texas initially denied TPA a hearing on these cases. TPA appealed arguing that the LECs had not demonstrated that their proposed rates and charges were cost-based as required by the FCC's new services test. The PUC granted, in part, TPA's appeal but held that the new services test did not apply to these LECs and ordered remand for determination of whether the proposed rates and charges were cost-based or otherwise justified under standards set forth by the PUC's order. An Administrative Law Judge requested submissions from the parties concerning whether the rates and charges had been shown to be cost-based. TPA filed comments and determined that after reviewing all of the proposed rates to withdraw from all of the pending cases except for ten cases.

The Administrative Law Judge ordered a hearing on the merits of the ten cases in which TPA maintained its opposition. As a result of the order referring the ten remaining cases for hearing, all but four of the applicants have agreed to reduce their line charges to the GTE level. The remaining four include United/Centel (Sprint). A pre-hearing conference was scheduled for April 23, 1998.

US WEST REGION

Arizona

The Arizona Payphone Association (APA) has challenged US West's and Citizens' Public Access Line rates with the Arizona Corporation Commission. The matter is still pending and hearing has not yet been set in the matter.

Colorado

US West's revised payphone tariff was initially approved. The Colorado Payphone Association filed a formal complaint with the Colorado Public Utilities Commission on March 31, 1998 challenging the rates. One day of hearings was held June 11, 1998, before the Administrative Law Judge. The CPA is seeking lower PAL and outgoing fraud protection rates (Customnet). They are scheduled to complete the hearing on July 22nd. A decision is expected from the ALJ later this year.

Minnesota

US West agreed, as of April 17, 1998, to reduce their "dumb" PAL rate to the 1FB rate.

Montana

The hearing on US West's PAL rates was held on 4/22/98. Briefing has been concluded. The decision is pending.

New Mexico

Teletrust, Inc. filed formal complaints against US West's payphone tariff. The New Mexico PUC has opened Docket No. 98325 in order to review US West payphone tariffs. The NM PUC has agreed to an informal pre-docket meeting in order to discuss the Teletrust complaint. At this time, no date has been set for either the informal meeting or a hearing.

North Dakota

The existing US West tariff for a line for a smart payphone is a \$25 flat rate. The PSPs in North Dakota did not pursue a challenge to this rate.

Washington State

In early 1998, an order was issued adopting the Northwest Payphone Association's recommendation to set the PAL rate at the simple business line rate of \$11 per month for the one remaining payphone tariff rate case (involving a small LEC, the Toledo Telephone Company). The Toledo Telephone Company will be making refunds on the difference between \$46 and \$11 retroactive to April 15, 1997.